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THE CONSEQUENCES OF ACCIDENTS UNDER WORK- MEN'S COMPENSATION LAWS.

It is the purpose of the normal compensation law to provide an indemnity in proportion to the wage-loss resulting from death or incapacity caused by accident¹ arising out of a risk of employment. But death or incapacity may be either wholly and directly, or only partly or indirectly caused by an accident. If wholly and directly caused thereby there is no question but that the resulting wage-loss should be charged entirely to the accident. But if only partly or indirectly caused thereby, many difficult questions arise. Those questions are the subject of this article.

¹ Not only are the terms and conditions appropriate to an *accident* compensation law inappropriate to be applied to diseases, but it is also the universal opinion of European experts that they cannot be applied thereto without charging industry with a mass of misfortunes for which it is not responsible. Accordingly the provisions of the sections of the British statute which apply to a few diseases specific to certain industries (and therefore called "industrial diseases") are radically different from those of its sections applying to accidents, being precisely fitted to their special purpose. Nevertheless many of the American workmen's compensation statutes (California, Connecticut, Iowa, Massachusetts, Michigan, New Hampshire, Ohio and Wyoming) have been made *prima facie* to cover diseases as well as accidents simply by eliminating, from measures appropriate only to accidents, the fundamental condition that there need be an accident. The construction and effects of such undefined departures from precedents do not come within the purview of this article.

Where death or incapacity is only partly or indirectly caused by an accident there must be some other cause or causes involved. And such other cause or causes may be either anterior or posterior to the accident.² These two classes of causes will be taken up in order.

CAUSES ANTERIOR TO THE ACCIDENT.

An anterior cause may be either (1) a pre-existing disease, (2) a pre-existing infirmity, or (3) old age.

Pre-existing Diseases.

A disease may be defined for our purposes as an organic ill of gradual growth. Where a workman suffering from a disease is the victim of an accident his disease may either, (1) aggravate the condition of his injury from the accident, or (2) be itself aggravated or accelerated, either (a) directly by the accident, or (b) indirectly by some consequence of the accident. If, then, death or incapacity results from any such aggravation or acceleration it is really the result of a combination of two causes—the disease and the accident. Under such circumstances should the indemnity be computed with allowance for the results of the pre-existing disease, that is, should the injury in effect be divided into two parts, one part morbid and the other part traumatic, and the indemnity be based solely upon the latter? And under what relations of cause and effect should death or incapacity be attributed in whole or in part to an accident when a pre-existing disease enters also into the chain of causation?

The English rule on these questions is as follows. Where an outbreak of a latent disease is caused by an accident the resulting death or incapacity should be deemed the result—i. e., entirely the result—of the accident.³ The test, in case of death,

² The logical analysis followed in this article is taken in large part from "*Traité . . . de la Legislation sur les Accidents du Travail*", by Adrien Sachet (Paris, Sirey, 1909), Chap. VI.

³ *Clover, Clayton & Co. v. Hughes* (House of Lords, 1910), 3 Butterworth's Workmen's Compensation Cases, 275; *McInnes v. Dunsmuir*, 1 *id.* 226 (1908); *Johnson v. S. S. "Torrington"*, 3 *id.* 68 (1909); *Trodden v. Lennard*, 4 *id.* 190 (1911); *Lee v. Baird*, 1 *id.* 34 (1908); *Lloyd v. Sugg*, 2 *Minton-Senhouse's Workmen's Compensation Cases* 5 (1900).

is, was it the disease that caused the death, so that whatever the workman had been doing he would probably have died all the same, or did the work he was doing contribute to it in any material degree?⁴ It is sufficient that the accident merely accelerates the result. Where a workman dies from a disease from which he would not have died at the time at which and in the way in which he did die had it not been for an accident, the accident must be held to have been the cause of his death.⁵ And where the pre-existing disease is aggravated, not directly by the accident, but indirectly by some consequence of the accident, the resulting incapacity is likewise to be deemed a result of the accident.⁶

No slip, wrench, sudden jerk, unusual exertion, or exterior violence is necessary to constitute the accident. The sudden outbreak or acceleration of a disease, to which a normal exertion of even the lightest kind of work has contributed, is sufficient. Almost is an accident to be inferred from the sudden outbreak of a pre-existing disease while at work.⁷ But not quite.⁸

The French rule differs only in requiring something more distinctly in the nature of an accident due to sudden, violent, and exterior cause arising out of a risk of the employment and a closer relation of cause and effect between such accident and the death or incapacity. Where an outbreak of a latent disease is caused by an accident, the resulting incapacity should be deemed the result of the accident. The basis for the compensation prescribed by the statute is the full difference between the earnings before the accident and the earning capacity thereafter, and it is error to make any allowance or deduction therefrom for a pre-existing morbid condition.⁹ Where the incapacity following

⁴ *Clover, Clayton & Co. v. Hughes*, *supra*, note 3.

⁵ *Golder v. Caledonian Rwy. Co.*, 40 S. L. R. 89 (1902), and cf. *Dunnigan v. Cavan*, 4 B. W. C. C., 386 (1911).

⁶ *Ystradowen Co. v. Griffiths*, 2 B. W. C. C. 357 (1909).

⁷ *Clover, Clayton & Co. v. Hughes*, *supra*, note 3. It must be said, however, that the inferior courts are exercising the greatest ingenuity to avoid the logical consequences of this decision.

⁸ Cf. *Hawkins v. Powells Co.* (Ct. of Appeal, 1911), 4 B. W. C. C. 178; *Kerr v. Ritchies* (Ct. of Appeal, 1913), 6 B. W. C. C. 419.

⁹ *Devaux v. Compagnie Babcock*, *Cour de Cession*, Oct. 24, 1904;

an accident is attributed by the medical experts one-third directly to the accident and two-thirds to a pre-existing state of arthritism and habits of intemperance, the compensation due is based upon the entire reduction in earning capacity and not upon only one-third of it.¹⁰ Where incapacity from a pre-existing malady has undoubtedly been accelerated by an accident, though the malady might have progressed to the same stage anyhow, the incapacity is the result of the accident.¹¹

But the accident must be the determining cause of the crisis of the pre-existing disease, and not merely the circumstance to reveal a diseased condition.¹² And it must be the direct and immediate cause of the death or incapacity, it not being sufficient that by diminishing the forces of the victim and confining him to bed it has indirectly contributed to that result.¹³ If an injury is really caused by a simple exertion, even though such exertion be entirely normal to the victim's work, the injury should be considered as resulting from an accident.¹⁴ But an injury should not be attributed to a slight exertion, jolt, stumble, or other false movement, if the morbid condition of the victim makes it doubtful that such event was the determining cause.¹⁵

The German rule is similar to the French. Where the required causal connection exists between an accident and the death or incapacity, the latter is to be deemed altogether the result of the accident, though a pre-existing morbid condition has contributed to it. And it does not matter that, were it not for the accident, the death or incapacity would have apparently resulted from the disease within a definite short time anyhow. In

Bompard v. Compagnie P.-L.-M., *id.*, July 31, 1906; Hemart v. M \acute{e} a, *id.*, Apr. 12, 1907.

¹⁰ Lamoine v. Compagnie Commentry, *id.*, July 18, 1905.

¹¹ Compagnie de Gaz v. Sar, *id.*, March 25, 1908.

¹² Letellier v. Turco, *id.*, May 1, 1911.

¹³ Gauthier v. Chemin de Fer, *id.*, July 27, 1905.

¹⁴ Quantin v. Ancanne, *id.*, Dec. 22, 1909. See also Soci \acute{e} t \acute{e} Commentry v. Delfour, *id.*, Feb. 17, 1908.

¹⁵ Dubois v. Compagnie du Nord, *id.*, Dec. 23, 1903; Lambert v. Odoul, *id.*, Feb. 19, 1908; Revault v. Pasquer, *id.*, July 8, 1902; Letellier v. Turco, *supra*, note 12. As might be inferred, the majority of these cases relate to hernia.

a case such as just specified the compensation for the accident should not be limited to the time within which the victim would have died or been incapacitated by disease anyhow.¹⁶

But the employment cannot be held responsible for sudden injuries to health occurring during the course of work, if they may be accounted for altogether by bodily predisposition and by reason of their causes cannot be deemed accidents in the general sense of the word.¹⁷ In general outbreaks of hernia, tuberculosis, heart disease, *etc.*, occurring during the work, are not to be deemed work accidents unless there was some severe exertion or event of violence to cause them, it being considered otherwise that the work only furnished the opportunity for and was not the cause of such outbreaks. But where peculiar circumstances clearly indicate that a merely normal exertion has truly caused an outbreak of disease, it will be held a work-accident.¹⁸ Such is seldom the case with hernia.¹⁹

American decisions on these points are as yet few. Where a workman dies following an internal rupture suffered while exerting great pressure with his body in his work and it is found that the proximate cause of death was the unusual pressure on parts weakened by disease, which but for such pressure would have held out for a considerable time, the death should be deemed the result of the accident.²⁰ Where a school teacher in charge of children at play died of an attack of arterial sclerosis brought on by a blow from a basketball, the death should be deemed the result of the accident, being caused proximately by the accident.²¹ Where an employee dies from heart disease

¹⁶ "*Handbuch der Unfallversicherung, 1909*" (Kreitkof & Hartel, Leipzig, 1909), pp. 255-6. The first volume of this publication contains an official summary of the decisions construing the German workmen's accident insurance statutes and is authoritative.

¹⁷ German Imperial Insurance Office (Grosser Senat, Feb. 26, 1914), cit. "*Bulletin des Assurances Sociales*", April, 1914, p. 26.

¹⁸ *Handbuch*, pp. 72-74, 76.

¹⁹ *Id.*, pp. 73, 267.

²⁰ *Voorhees v. Smith*, 92 Atl. 280 (N. J. 1914). See also Massachusetts' Industrial Accident Board; *Homan's Case*, 2 "Reports of Cases under the Massachusetts' Workmen's Compensation Law," 775 (1914); *Gariella's Case*,

²¹ *Milwaukee v. Industrial Commission*, 160 Wis. 238 (1915). This case 2 *id.*, 137 (1914).

brought to a crisis by hurry and excitement, his death is an injury arising out of the employment.²² Where were it not for an accident a disease would have resulted in the victim's death or incapacity within a definite time anyhow, the compensation for the injury should be limited to such time.²³

Some American statutes define "injuries" to be compensated for to include only "injuries by violence to the physical structure of the body and such diseases or infections as naturally result therefrom."²⁴ *Quaere*; whether such provisions exclude injuries which consist simply of outbreaks of pre-existing diseases caused by the "violence" of minimum exertions?

Pre-existing Infirmities.

The word infirmity is here used to mean a fixed injury, distinguishable from both a disease and old age by the fact that it is not progressive. Where a workman with an infirmity subsequently suffers another permanent injury by accident, generally, though not always, the two injuries are distinct, and there is consequently no confusion of causes as to them, such as there is where a single injury results from a pre-existing disease and an accident combined. But there is often a serious confusion of causes as to the victim's subsequent incapacity. To illustrate: A workman blind in one eye, later loses also the other eye. Had this accident occurred to a normal person with two eyes, the resulting incapacity would be slight, but owing to the previous loss of the other eye it is total. Is it, then, proper to charge all of this total incapacity to the accident which has caused only the second injury?

A disposition is manifested, particularly in some of our American statutes, to make the answer to this question depend upon whether or not the pre-existing infirmity has been com-

further holds that "proximate cause" has a somewhat different meaning in compensation law from its meaning in negligence law.

²² Brightman's Case, 220 Mass. 17 (1914).

²³ Horne's Case, 1 Mass. W. C. C. 34 (1913); Jones' Case, 2 *id.* 301 (1914).

²⁴ Louisiana, Sec. 39; Nebraska, Sec. 52 b; Pennsylvania, Sec. 31. For other somewhat similar provisions, see statutes cited *post*, p. 447.

pensated for. But that is illogical. Either the second injury has caused all the incapacity to be compensated for, or it has not. But the question persists, where two successive injuries have occurred, should the rule be that the combined results of both shall be charged altogether to the employer of the time of the second?

In the cases immediately following, the pre-existing infirmity was not the subject of compensation. Where a one-eyed workman loses the sight of his remaining eye by accident, by the terms of the statute the compensation due is based upon the difference between the earnings before the later injury and the wage earning capacity thereafter, and not upon what the reduction in earnings would have been had it not been for the pre-existing infirmity.²⁵ And the same rule applies where a one-handed workman injures or loses his remaining hand.²⁶ Where a workman, who is without sight in one eye, loses the sight of his second eye, he is entitled to compensation for total disability.²⁷

It should be noted in this connection that the "hand cases" differ from the "eye cases", in that the loss of the first hand almost always results immediately in reduced earnings, whereas the loss of the first eye often does not do so until after the second injury. Consequently *Matter of Schwab v. Emporium Co.*,²⁸ which holds that where a one-handed man loses his second hand he is entitled to compensation for total disability, does not support the rule in the preceding cases, for the reason that in this case the victim's earnings at the time of his second injury already reflected the loss from the first injury, so that the difference between his earnings before and after the second injury fairly represented the consequences of it alone.

The contrary rule that the loss of an eye gives right to compensation for only partial disability, although the injured workman has already lost his other eye and in consequence is totally

²⁵ *Delincé v. Feller*, *Cour de Cass.*, July 23, 1902; *Goudemant v. Thuriot-Godin*, *id.*, Dec. 10, 1902; *Leclair v. Morillon*, *id.*, Nov. 11, 1903; *Ollivier v. Ateliers de la Loire*, *id.*, Nov. 25, 1905; *Busson v. Ory*, *id.*, Dec. 1, 1908.

²⁶ *Servant v. Huan*, *id.*, June 30, 1903.

²⁷ *Morrison's Case*, *Mass. Ind. Acc. Bd.* (1914); 2 *Mass. W. C. C.* 594.

²⁸ 167 *App. Div.* (N. Y.) 614, *aff'd* 216 N. Y. (Nov., 1915).

disabled, has been laid down by the Supreme Courts of Minnesota²⁹ and Michigan,³⁰ construing specific provisions of their local statutes.³¹

The following cases differ from the preceding in that the two injuries were not distinct, but the later aggravated or added to the earlier. Where a workman suffers impairment of vision in one eye by an accident and thereafter totally loses the sight of the same eye by another accident, the degree of incapacity following the second accident is the result thereof.³² If a workman who has lost the sight of one eye, but without any disfigurement, later suffers an accident which necessitates the removal of that eye and is unable to secure employment because of the disfigurement, such "incapacity to obtain work" constitutes "incapacity for work", and is the result of the later accident.³³ Where a pre-existing infirmity is increased by an accident, as, for example, where a workman loses a limb which was already defective, the consequences of the two injuries are not to be separated in fixing the compensation for the later.³⁴

The attribution of the consequences of two successive injuries altogether to the second sometimes operates to the disadvantage of the victim. Thus, where a workman who has lost a finger by accident and received compensation for temporary total disability, is taken back at lighter work at his old wages, and thereafter is further incapacitated by his wounded hand's becoming inflamed from the habitual use of a pneumatic hammer, his resulting incapacity is the result of the second injury and consequently is not due to an accident.³⁵

Let us turn now to cases of successive injuries, both falling under the compensation law.

Under the French rule the compensation for an accident to a sound workman resulting in an infirmity is based upon the

²⁹ State *ex rel.* Garvin v. Dist. Court, 151 N. W. 910 (1914).

³⁰ Weaver v. Maxwell, 152 N. W. 993 (1915).

³¹ Q. v., *post*, p. 428.

³² Martin v. Barnett, 3 B. W. C. C. 146 (1910).

³³ Ball v. Hunt (H. of L., 1912), 5 B. W. C. C. 459.

³⁴ Handbuch, p. 256.

³⁵ Noden v. Galloways, 5 B. W. C. C. 7 (1912).

consequent reduction in his "professional capacity", which is measured, not by the difference between his *individual* wages or earnings before and after the injury, but by the reduction in earnings *normally* resulting (both immediately and throughout the future) from such an injury.³⁶ Thus it has been held, ignoring the circumstance that the victim had been taken back by his old employer at his old wage, that the reduction in professional capacity from the loss of an eye should be fixed at twenty-five per cent.³⁷ If, then, a workman so compensated for the loss of one eye should thereafter lose his other eye, the total reduction in earnings resulting from both injuries should be compensated for by the employer of the time of the second injury, and yet the workman should continue to receive the compensation awarded for the first injury.³⁸ This is an exceptional case presented to indicate a defect in the rule. Where, however, the wages following the first injury have actually been reduced in proportion to the reduction in "professional capacity", as is generally the case, the application of this rule does not charge any part of the loss from the first injury to the second.

The German law is similar to the French. The compensation for an accident to a sound workman resulting in an infirmity is based upon the consequent reduction in his earning capacity. "Earning capacity," in this connection, is given substantially the same meaning as "professional capacity" under the French law.³⁹ Loss of earning capacity includes inability to obtain

³⁶ *Eber v. Bernanose, Cour de Cass.*, Nov. 26, 1901; *Société Denain v. Donnez, id.*, Jan. 7, 1902. Some allowance for the potential loss from increased liability to disablement seems also to enter into the appraisal of "professional capacity" after injury. Under the application of this rule, what is recognized to be a serious abuse has developed in France and Germany, of allowing small life pensions (popularly known as "drink money pensions") for trifling infirmities, though they entail no reduction in actual earning power. In part this is a consequence of an arbitrary assumption of a reduction in professional capacity regardless of the actual results. In this connection it should be noted that none of the European compensation laws contain schedules of specific compensations for special injuries, such as are common to the American laws.

³⁷ *Benoist v. Berthelot, Cour d'Appel de Rennes*, Nov. 27, 1900; and cf. *Raffinerie v. Becuwe, Cour de Cass.*, Jan. 19, 1903.

³⁸ Cf. Sachet, p. 248.

³⁹ *Handbuch*, pp. 262-4. Cf. comments under note 36.

work resulting from the injury. And reduction therein is not necessarily to be measured by the wages received upon the resumption of work. For example, the fact that the employer takes the victim back at his old wages does not avoid a reduction in earning capacity.⁴⁰ A heavy reduction in earning capacity is always to be assumed from the loss of an eye⁴¹—never less than twenty-five per cent and sometimes thirty-three and one-third per cent.⁴² If, then, a second infirmity is thereafter suffered, the existence of the first infirmity should not stand in the way of full compensation for the second.⁴³ Supposing that earning capacity is reduced fifty per cent by the first injury and that the capacity remaining thereafter is completely destroyed by the second, the loss from the second is not fifty per cent of full *normal* earning capacity, but one hundred per cent of a *reduced* earning capacity.⁴⁴ Therefore the first injury, and the questions whether or not it has been compensated for, and, if so, at what rate, are to be ignored as irrelevant. And the fact that the aggregate compensation for the two injuries may exceed one hundred per cent of actual earnings at the time of the second is immaterial, because the two compensations are proportions of two distinct earning capacities.⁴⁵

Commenting upon this rule and upon the grounds therefor, it is to be observed that the term "earning capacity" is used therein indiscriminately in two different senses. In determining the loss from the first injury the remaining earning capacity is not measured by wages, whereas in determining the loss from the second injury the earning capacity preceding it would normally be measured by wages, and, consequently, in the period between two injuries a workman (for example, one who has lost an eye without any actual reduction in wages) would be attributed with two different earning capacities—the one to measure his loss from the first injury and the other to measure his loss from any later injury. The result might be an aggregate compensa-

⁴⁰ *Handbuch*, p. 264.

⁴¹ *Id.*, p. 266.

⁴² *Id.*, p. 265.

⁴³ *Id.*, p. 263.

⁴⁴ *Id.*, p. 265.

⁴⁵ *Id.*, pp. 265-6.

tion based upon one hundred and thirty-three per cent. of the actual aggregate reduction in earning capacity resulting from the two injuries. This result is avoided by a special statutory provision in effect substituting "professional capacity" instead of wages at the time of the second accident as the basis for computing the reduction in earning capacity resulting therefrom.⁴⁶

The English courts follow the letter of their statute in basing compensation for an infirmity upon the difference between the injured person's earnings before the accident and the amount he is earning or able to earn thereafter. But where he is taken back by his old employer at his old wages, such wages, being an act of grace, are not considered "earnings". And the earnings immediately after resumption of work are not treated as the permanent standard of what the workman is "able to earn after the accident", if it appears that incapacity from the injury may later develop or increase. Under either of the several contingencies just specified a "suspensory award" should be made, so that compensation may be awarded at any later time and computed according to the then existing conditions, when and if a reduction in earnings actually occurs.⁴⁷ But what rule should be applied, if, after a suspensory award for, say, the loss of an eye, the workman later loses the other eye, seems not conclusively settled. According to the earlier decisions,⁴⁸ the entire wage loss from both injuries should be charged to the second accident; but the alternative of opening the suspensory award and charging part of the loss to the earlier injury is practicable.

In America, Wisconsin and Michigan decisions leave the rule for compensating for the later of successive injuries similarly in doubt. In the absence of evidence that the loss of or a permanent injury to one eye results in some actual reduction in earning capacity, it was held to be error to award compensation therefor as for permanent partial disability.⁴⁹ If, then, the

⁴⁶ Law of June 30, 1900, Art. 10, Sec. 5; now Code of July 19, 1911, Art. 571.

⁴⁷ *Taylor v. London & N. W. Rwy.* (House of Lords, 1912), 5 B. W. C. 218.

⁴⁸ Cited *supra*, p. 424.

⁴⁹ *International Harvester Co. v. Industrial Commission*, 147 N. W. 53 (Wis. 1914); *Hirschhorn v. Friese*, 150 N. W. 851 (Mich. 1915).

second eye should later be lost by accident, should the aggregate consequences of both injuries be charged solely to such later accident? In New Jersey, however, it has been held that though no loss of wages results from an injury, yet the victim is entitled to compensation if his "physical efficiency" is thereby impaired.⁵⁰

Many of the American statutes contain express provisions relating to the contingency of successive infirmities. Some prescribe more or less clearly that the consequences of an accident shall be distinguished from the aggravations resulting from a pre-existing infirmity and be compensated for as if such infirmity did not exist.⁵¹ The Michigan statute⁵² is ambiguous, but has been construed to have the same effect.⁵³ Others provide in effect that the compensation for a second injury shall be based upon the aggregate consequences of the two injuries, but with credit for the compensation, if any, awarded for the first injury.⁵⁴ And others are ambiguous, prescribing generally that the compensation shall be based upon the "earning capacity" at the time of the second accident.⁵⁵

As has already been noted the rule of some of these American statutes that the employer of the time of the second injury owes compensation for the combined consequences of both injuries *unless* the first has been compensated for, though well intentioned, is unprincipled.

The remaining confusion on the subject of successive infirmities seems to arise from a failure to distinguish between two different conditions: (1) The first injury may have resulted in a reduction in actual earnings (wages) fairly commensurate

⁵⁰ *Burbage v. Lee*, 93 Atl. 859 (1915).

⁵¹ California, Sec. 15 b 2 (10); Illinois, Sec. 10 h; Minnesota, Sec. 13 c; Nebraska, Sec. 28; New York, Sec. 15 (6); Nevada, Sec. 25; Wyoming, Sec. 19 b. *Schwab v. Emporium Co.*, *supra*, note 28, construed the New York act before the provision here cited was inserted by amendment.

⁵² Pt. II, Sec. 11.

⁵³ *Weaver v. Maxwell*, 152 N. W. 993 (1915).

⁵⁴ Indiana, Secs. 33-35; Maryland, Sec. 24; Montana, Sec. 161; Oregon, Sec. 21 h; Washington, Sec. 6604-5 g.

⁵⁵ Colorado, Sec. 4 b II; Maine, Sec. 1 (IX e); Oklahoma, Art. II, Sec. 6; Rhode Island, Art. II, Sec. 13 d; Wisconsin, Sec. 2394-10 (1d).

with the reduction in "professional capacity". (2) It may not. In the first case the workman's actual earnings (wages) preceding the second injury may properly be used as the basis from which to compute the reduction in earning capacity caused by such injury; but in the second case they may not—then only his "professional capacity" at the time of the second injury is a reasonable basis.

Old Age.

Old age differs from an infirmity in that it is progressive; and from a disease in that its progress is always certain.

Under the compensation law old age gives rise to two questions. First. Where an aged workman suffers a trifling accident, which only because of his pre-existing physical defects is followed by permanent incapacity, should such incapacity be deemed the result of the accident? Second. Where a workman who is permanently incapacitated by accident is so infirm that he would soon have become incapacitated anyhow, even had there been no accident, should his incapacity for the remainder of his life be charged entirely to the accident?

Under almost all the older compensation laws the rule that aggravations or accelerations of incapacity due to old age should be charged to the accident has become established almost without question and with infrequent recourse to the higher courts. But unfavorable experience under that rule has caused the questions just stated to be raised when framing, and upon the construction of, later statutes.

The German Imperial Insurance Office has ruled that where incapacity is caused by an accident the right to a life pension is not affected by the fact that even if there had been no accident the victim would soon have been incapacitated from old age.⁵⁶

In Massachusetts it has been held that where a workman is totally incapacitated as the result of an injury caused by his work the fact that he was physically failing and would be so in-

⁵⁶ *Handbuch*, p. 256. An interesting illustration of the results of this rule is that where a workman, on the point of retirement on account of the weaknesses of old age, is killed by accident, leaving a very young widow, she is entitled to a pension for the remainder of her life, which turns the accident into a source of great profit.

capacitated anyhow in the course of a few years does not bar him from full compensation.⁵⁷

The Wisconsin statute contains an express provision reducing the rate of compensation five per cent for workmen over fifty-five years of age, ten per cent for those over sixty, and fifteen per cent for those over sixty-five.⁵⁸

Summary.

Reviewing the entire subject of anterior causes of aggravation, two important controversial questions stand out and call for especial consideration.

First. What should be considered a work-accident? The English rule is peculiar in holding that the outbreak of a latent disease contributed to by a normal exertion of light work should be ascribed to an accident, even though the morbid condition of the victim indicates something else as the determining cause. The effect is to place upon the employer a heavy charge for an extra risk for every sickly or aged person he takes on, and consequently to impel him to discriminate extraordinarily against such persons and against persons of unknown health and habits in giving employment. Simply to hold the employer liable for aggravations of the consequences of accidents from anterior causes, even where such accidents are really due to risks of the employment, leads, as will be noted later, to much discrimination against the physically defective; but the English rule goes still further and greatly increases that discrimination, by holding the employer liable in practice for the consequences of risks arising altogether from the physical defects of the person and not at all from the nature or conditions of the work at which the person is employed. In so doing this rule violates the doctrine of "trade risk", upon which the compensation law is based. The better rule, therefore, is that laid down in the French and German decisions and in the dissenting opinions in *Clover, Clayton and Company v. Hughes*.⁵⁹

⁵⁷ Duprey's Case, 219 Mass. 189 (1914).

⁵⁸ Secs. 2394-9.

⁵⁹ *Supra*, note 3.

Second. Should the wage loss from death or incapacity resulting from an anterior cause, aggravated or accelerated by accident, or from an injury by accident, aggravated by an anterior cause, be charged entirely to the accident, without any deduction for the consequences of such anterior cause? We have seen that the affirmative answer to this question has prevailed in all the foreign jurisdictions considered. But it has so prevailed only by emphasizing the letter of the statutes, and in some jurisdictions only after a long struggle against a strong minority opinion. And in the American statutes there is manifested a tendency towards an alternative rule for pre-existing infirmities and old age. It seems purely fortuitous that it is not yet here sought to apply the alternative rule also to pre-existing diseases,⁶⁰ for they are a much weightier factor in aggravating the consequences of accidents than are pre-existing infirmities, and the objections to the established rule are stronger in application to diseases than to infirmities.

The alternative rule, and the arguments for and against the two rules are briefly as follows.

The established rule is based upon the proposition that an injured workman's earning capacity at the time of an accident (in practice generally measured by his average earnings or wages immediately before the accident) may in all cases properly be taken as the basis for computing the loss in earning capacity resulting from the accident. But under some conditions such basis is improper. Admittedly in the case of a young person some allowance should be made for the prospective increase in his future earning capacity upon reaching maturity.⁶¹ By parity of reasoning some allowance should be made in the case of an aged person for the impending reduction in his earning capacity. And similarly where a workman is suffering from a serious disease or infirmity his prospects for the future are not equal to what

⁶⁰ But perhaps some of the provisions of American statutes cited *post*, pp. 447-8, may be construed or at least intended to apply to cases of pre-existing disease. And see also decisions of Mass. Ind. Acc. Bd., *supra*, p. 422.

⁶¹ Provisions to this effect are to be found in the laws of Great Britain, California, Colorado, Maryland, Massachusetts, New York, Ohio, Oklahoma, and Wisconsin.

they would be if he were sound, notwithstanding that for the time being his earnings or earning capacity, are still unimpaired. Therefore in such cases the injured workman's *prospective* earning capacity—his "professional capacity"—at the time of the accident, which, if he is sickly, infirm, *etc.*, may be much less than his immediate earning capacity, should be used as the basis from which to compute his loss from the accident.

In support of this rule it is argued that (1) it is in accord with the principle and purpose of the law,⁶² (2) it would enable employers to take on and to continue to employ workmen who are known or suspected to have latent diseases or infirmities or who are approaching old age without subjecting themselves to the charge of an extra risk in consequence, and thereby would benefit both industry and the working classes; whereas the established rule tends to create of such persons a new class of unemployables, though for some indeterminate time they may still be able to work and to earn good wages.

A committee appointed by the British Home Office in November, 1903, to inquire into the operations of the workmen's compensation acts, recommended as a cure for this evil effect of the established rule (which it found to be serious) that the law be amended to enable employers to hire aged and infirm persons upon special terms as to compensation for accidents, and suggested an age limit of sixty, if hale, and under that age if infirm or maimed. This recommendation was not adopted. It appears to be subject to the criticism that it might go too far in the way of enabling employers to contract out of their proper responsibilities.

On the other hand many labor representatives seek to cure this evil either (a) by a provision of law that insurance premium rates "shall take no account of any physical impairment of employees";⁶³ or (b) by state insurance at "flat rates".

⁶² For an indication of an intention on the part of the framers of the French Statute to exclude aggravations from anterior causes, cf. "*La Responsabilité et les Accidents du Travail*", by Henry Sagot (Rousseau, Paris, 1904), p. 113.

⁶³ Pennsylvania, Sec. 4; House of Commons Bill of June 25, 1914, by Mr. A. H. Gill.

But the former remedy cannot be efficient, because, though physical impairments of employees may be ignored in the inspections of establishments to fix premium rates for insurance, yet the results of that element of risk will inevitably appear in the loss cost and must eventually cause a corresponding differentiation in rates, unless "flat rates" be resorted to. And "flat rates" as a remedy would be worse than the disease, since, by equalizing the insurance charge to employers, regardless of the relative hazards of their respective establishments, such rates would in effect subsidize dangerous conditions and discourage accident prevention. And both of these proposed remedies are expedients to cure an evil created by law, for which the natural remedy is to amend the law so that it will no longer create the evil. This result, it is claimed, would be effected by the adoption of the alternative rule under discussion.

The arguments in support of the established rule, on the other hand, together with the specific objections to such arguments, are briefly as follows.

1. The letter of nearly all the existing compensation statutes supports the established rule.

However conclusive this argument may be as to what the law is, it is of little weight as to what the law should be.

2. It is a well established rule of the common law that a person is liable for the damages which *proximately* result from his culpable act, no matter whether the condition of the injured person before the act caused the damages to be greater than they otherwise would have been. And the compensation law emphasizes rather than alters this principle.⁶⁴

But the proposition with which this argument concludes seems to be directly contrary to the British authorities. The House of Lords has held that under the compensation law the employment need not be the proximate cause of the accident and that the accident in turn need not be the proximate cause of the injury.⁶⁵ This shows that the compensation law has to

⁶⁴ Cf. 29 Harvard Law Review 104 (Nov., 1915), citing *Lee v. Baird*, 45 S. L. R. 717.

⁶⁵ *Clover, Clayton & Co. v. Hughes*, *supra*, note 3.

a large extent abrogated the rule of proximate cause. How then has it emphasized the principle?⁶⁶

3. If the accident, following which a workman dies or is incapacitated, had not happened, he, though then suffering from a disease, an infirmity, or old age, would have earned his wages for some indeterminate time longer, and perhaps just as long as any given one of his sound, healthy, or younger comrades.

In application to pre-existing infirmities, because they are fixed and not progressive, this argument is sound, so far as it goes. But in application to pre-existing diseases and old age it is most unsound, because it is based upon a general assumption of facts, which more often than not is directly contrary to the probabilities. To illustrate. In application to a case where the victim of an accident was suffering from a disease which would have brought about incapacity within a definite time without any accident, this argument manifestly does not hold good. And in cases like *Clover, Clayton and Company v. Hughes*,⁶⁷ where a mere normal exertion of light work has contributed to the fatal termination of a disease, it is absurd to argue that were it not for such "accident" the workman might have continued to earn his old wages for an indeterminate period, since ability to endure such a normal exertion is a prerequisite to earning wages.

4. If we should undertake to weigh the modifications which the physical peculiarities of each victim may produce in the consequence of his injury, we would encounter insuperable difficulties. What man is there who has not or who is not disposed to some disease or infirmity? In man's physical constitution the ideal of perfection is never attained. Consequently the greater part of accidents would raise the question of the influence of pre-existing maladies or infirmities, and an attempt to measure that influence whenever the question is raised would so swell

⁶⁶ In some other jurisdictions, however, the rule of proximate cause is not so sweepingly discarded. Cf. *Cour de Cassation*, Feb. 21, 1912, *post*, p. 442. And some American decisions do emphasize it. *Gt. Western Co. v. Pillsbury*, 151 Pac. 1136 (Cal. 1915); *Voorhees v. Smith*, 92 Atl. 280 (N. J. 1914); *Milwaukee v. Ind. Comm.*, 160 Wis. 238 (1915).

⁶⁷ *Supra*, note 3.

the volume of litigation as to defeat one of the primary purposes of the compensation law, which is to avoid litigation.⁶⁸

This argument is probably the strongest in favor of the established rule, and would be conclusive if its propositions were exact. But they are, more or less, exaggerations. Under the French and German practices the reduction in "professional capacity" resulting from diseases and infirmities *after* accidents is all the time being successfully valued by medical experts. There is no reason why such reduction *before* accidents cannot be equally well valued. Where the evidence for such valuation fails, it simply results in some advantage to the injured workmen in practice over theory.⁶⁹ And experience in France, in the jurisdictions wherein the practice of distinguishing the results of anterior causes from the strict results of work-accidents prevailed for some years (until suppressed by the rulings of the highest court), indicates that such practice would not cause any noticeable increase in litigation. Indeed, it is not certain but that it would reduce litigation, for the established practice, by holding out a gambling chance of compensation for invalidity, if anything in the form of accident to which to attribute it has happened or can be invented, perhaps breeds more litigation than would the alternative practice.

CAUSES POSTERIOR TO THE ACCIDENT.

The consequences of an injury by accident may be aggravated by one or more causes posterior to the accident, which causes may be conveniently grouped and studied under the following categories: Contamination of wounds, the medical and surgical treatment, suicide, new accidents, new diseases, misconduct of the victim.

Contamination of Wounds.

It is generally agreed that the infection of a wound with tetanus, septicaemia, gangrene, *etc.*, should be charged to the

⁶⁸ Sachet, p. 244.

⁶⁹ On the foregoing propositions, cf. "*L'Évaluation des Incapacités Permanentes*," by Dr. Ch. Remy (Vigot, Paris, 1906), Ch. XVI.

accident which caused the wound, unless imputable to the neglect of the victim,⁷⁰ or, it seems, to the intervention of some remote cause.⁷¹ Where a workman's finger nail is torn off and he continues to work without notice to his employer and without taking any care or precaution, death resulting from an infection of the wound should be charged to the misconduct of the victim.⁷² But suppose that the wound is so trifling that it is not treated as an accident (*e. g.* a painless scratch or abrasion, or a cinder in the eye) and by reason of the consequent neglect it becomes infected, is that a *new* accident, or a result of the original injury, or should it be imputed to the misconduct of the victim?⁷³ In a case of a painless breaking of a blister, the German Insurance Office, reversing the tribunal of first instance, has held that incapacity resulting from an infection of the wound should be deemed a result of the accident, regardless of whether the infection occurred at or away from work.⁷⁴

The Medical and Surgical Treatment.

Whether or not aggravations of the original injury caused by the medical or surgical treatment should be considered to result from the accident, is a question which so far has been decided according to the apparent equities of each case, without the development of any clearly defined rules or principles.

Where a workman dies from the effects of chloroform, administered by a surgeon employed by his employer's insurance carrier, for the purpose of an operation, his death is the result of the accident.⁷⁵ Where a workman would have recovered from the effects of an accident but for negligent and defective treatment by a "bone-setter" to whom he resorted, his continued

⁷⁰ Cf. *Dunham v. Clare*, 4 M.-S. W. C. C. 102 (1902); *Burn's Case*, 218 Mass. 8 (1913); *Gt. Western Co. v. Pillsbury*, 151 Pac. 1136 (Cal. 1915).

⁷¹ *Handbuch*, p. 249.

⁷² *Veuve Landry v. Rochereau*, *Cour d'Appel d'Angers*, Aug. 11, 1902.

⁷³ Cf. *Cline v. Studebaker*, 155 N. W. 519 (Mich. 1915); *Fleming's Case*, 2 Mass. W. C. C. 411 (1914), and *post*, p. 446. As to the contamination of wounds incurred away from work, cf. *Chandler v. Gt. W. Rwy.*, 5 B. W. C. C. 254 (1911).

⁷⁴ *Handbuch*, p. 249.

⁷⁵ *Veuve Perrotte v. Dior*, *Tribunal d'Avranches*, Feb. 8, 1907.

incapacity is not a result of the original injury.⁷⁶ In a case where, instead of amputating a badly lacerated hand, as was the standard practice under the circumstances, the surgeon at a public infirmary tried to save it by a series of operations entailing the repeated use of an anaesthetic, from the second administration of which the patient died, it was held that the treatment was reasonable and therefore that the death was chargeable to the accident.⁷⁷ Where a workman was put under anaesthetics to amputate an injured finger, and immediately after such amputation the surgeons decided to put him again under anaesthetics, to remove a sore tooth of which he had complained, in the course of which second operation he died, there being no proof that the death was due to the first administration of the anaesthetics, it was held that it could not be charged to the accident.⁷⁸ Where during an operation on a workman for accidental hernia it was discovered that he had a second hernia of long standing and both were operated upon at the same time, and subsequently he died from heart weakness resulting from the strain of the operation, it was held that there was evidence to justify a finding that the death was the result of the accident.⁷⁹ Where a chauffeur, injured in the hand, was under treatment in a hospital, where he went with the privity and consent of his employer, and an abscess of the thumb developed, caused by an unpadded splint, it was held that the injury was a result of the accident, and, in the absence of evidence to show that it was due to negligence of the physician, that it was unnecessary to decide whether such negligence would amount to a break in the chain of causation.⁸⁰

Under the German law the consequences of injudicious medical and surgical treatments have generally been held to be results of the accidents.⁸¹ But that conclusion would seem to

⁷⁶ *Humber Co. v. Barclay*, 5 B. W. C. C. 142 (1911).

⁷⁷ *Shirt v. Calico Ass.*, 2 B. W. C. C. 342 (1909).

⁷⁸ *Charles v. Walker*, 2 B. W. C. C. 5 (1909).

⁷⁹ *Thomson v. Mutter*, 6 B. W. C. C. 424 (1913).

⁸⁰ *Newcomb v. Albertson*, 89 Atl. 928 (N. J. 1914).

⁸¹ *E.g. Handbuch*, p. 250.

follow practically from the fact that under that law the employers' mutual insurance associations, being obligated to supply all necessary treatment, are, in return, given almost absolute control over it.

A leading French commentator ⁸² has advanced the proposition that the consequences of the medical or surgical treatment should always be deemed results of the accident, because the risk of bad treatment, or, to put it more mildly, of mistaken treatment, is an inevitable consequence of injury. But this ignores the fact that the workman may himself be responsible for the quality of his treatment and consequently for the degree of such risk.⁸³ It is submitted that a more just and expedient rule would be as follows. The consequences of the medical or surgical treatment should be deemed to result from the accident unless responsibility therefor be imputable to the workman. And such responsibility should be imputed to the workman wherever he either exercises a right to select the physician, or neglects, when he is able, to give his employer notice and opportunity promptly to furnish competent treatment. This suggested rule is based upon the supposition that it is expedient that the treatment should be furnished by the employer. In the abstract this supposition is supported by the fact that the amount of the employer's liability for compensation will depend greatly upon the quality of the treatment. And in the concrete it is supported by experience in France, where the fact that the injured workman may choose his own physician, though the employer pays the charges, has resulted in such an inferior medical and surgical service that the consequences of work-injuries in the aggregate have been immensely aggravated by this posterior cause. It does not suppose for its application that the employer should be under legal obligation to provide the medical service. The imposition of such an obligation upon him is apt to subject him to abuse. For that reason, among others, such obligation is altogether excluded from the British law, and is limited to short periods after the accident under the American laws. It is sufficient that the risks of bad treatment are an ordinary consequence

⁸² Sachet, p. 251.

⁸³ *E. g.* Humber Co. v. Barclay, *supra*, note 76.

of an accident to a workingman, which the employer should be given every practicable opportunity to prevent, but which, if he then does not or cannot prevent, may in justice be attributed to the accident.

Poisoning caused by the workman's taking internally medicine meant for external use during the treatment of his injury, under some circumstances should be considered a result of the accident. Where the medicine was administered by a nurse in a hospital would appear to be such a case;⁸⁴ but not where it was carelessly administered in the workman's own home by a small child, though it might be decided to the contrary had the workman inadvertently taken it himself. Where the workman deliberately takes more of a medicine than ordered, the consequences are not to be attributed to his accident.⁸⁵

Under some conditions a contagious disease, contracted in a hospital where the injured workman has been sent for treatment, may rightly be attributed to the accident. But not unless the risks thereby incurred were greater than what the workman would have incurred in his everyday life. Thus where a workman was sent from a distance to a hospital in Hamburg, where an epidemic of cholera broke out and he caught the infection and died, it was held that his death was to be deemed the result of his accident, the epidemic not having reached the place where he lived.⁸⁶ Generally, typhoid fever may not be attributed to the stay in a hospital.⁸⁷

Suicide.

Death by suicide should be considered the result of an accident if the pain and depression resulting from the accident cause the workman to lose his reason or will power or are otherwise the direct cause of his ending his life.⁸⁸

⁸⁴ Sachet, p. 251.

⁸⁵ *Handbuch*, p. 251.

⁸⁶ *Handbuch*, p. 251. To same effect, *Hayard v. Loys*, *Tribunal de Rouen*, May 25, 1905.

⁸⁷ Sachet, p. 252, citing German Insurance Office.

⁸⁸ *Handbuch*, p. 253; *Malone v. Cayzer*, 1 B. W. C. C. 27 (1908); *Buray v. Delaunay*, *Cour de Cass.*, Oct. 25, 1905; *Sponatski's Case*, 220 Mass. 526 (1914); *Jaschick v. Hoerner*, N. J. Com. Pleas, Jan., 1916.

New Accidents.

Under exceptional circumstances a new accident should be considered the result of a previous accident. An accident on the journey after injury to or from a hospital or sanitarium should be deemed the result of the original accident, if due to the enfeebled condition of the injured person or to extraordinary risks incurred thereby. The usual risks of travel on street or railway cars, however, are not such extraordinary risks.⁸⁹ Where an injured workman who has been discharged from a hospital and sent home alone in the cars, though subject to frequent attacks of vertigo, suffers an attack on the journey, falls and is injured, this injury should be deemed the result of the original accident.⁹⁰ Where a workman, whose leg had been broken but had sufficiently healed to enable him to return to work, fell lightly on level ground and suffered a renewal of the old fracture, it may be that such second injury was due to the insufficient consolidation of the old fracture rather than to the later accident; but the burden is upon the victim to prove the relation of cause and effect between the old fracture and the new injury.⁹¹

New Diseases.

Under some circumstances death or incapacity from a disease incurred after an accident should be deemed a result of the accident.

The English courts go extremely far in attributing to accidents the consequences of subsequent diseases. Where a hunter has a fall and is wetted to the skin, and this, added to the fact that he has to ride home in the open, so lowers his vitality as to allow the germs of pneumonia, generally present in the respiratory passages, to multiply and attack the lungs, causing death, the death is "directly" caused by the accident.⁹² Where a

⁸⁹ *Handbuch*, p. 251.

⁹⁰ Sachet, p. 252, citing German Insurance Office.

⁹¹ *Leclercq v. Mines, Cour de Cass.*, Jan. 28, 1903; *Handbuch*, p. 250.

⁹² *In re Etherington*, 1 K. B. 591 (1909), and see also *Isitt v. Railway Ass. Co.*, 22 Q. B. D. 504 (1889). These cases were on accident insurance policies, not subject to the workmen's compensation law.

workman hurts his knee and by reason of his crippled condition is greatly delayed getting home and thereby unusually exposed to severe weather, as the result of which pneumonia supervenes and he is incapacitated, the question is whether his condition is the result of the accident in the sense that it is occasioned by his debilitated condition immediately after the accident.⁹³ Where a workman wounds his toe, is treated for that, but subsequently erysipelas sets in and he dies from blood poisoning, it is not necessary that the death should be the natural or probable consequence of the original injury; it is sufficient that the chain of causation is not broken by a *novus actus interveniens*.⁹⁴ And "*novus actus interveniens*" here means not only a new, but also an unconnected cause.⁹⁵ Where a workman hurts his knee, necessitating an operation, which is successful, but later contracts scarlet fever, the wound suppurates and the knee joint has to be excised, causing incapacity, it being found that the supuration might have been caused by the fever but that were it not for the wound it could not have had the effect it did, the incapacity should be deemed the result of the accident.⁹⁶ Where a workman was paralyzed by an accidental injury and some twelve months later died of pneumonia contracted several days before his death, the death is the result of the accident, though the pneumonia did not result from his original injury, but rather his exhausted vitality and reduced power of resistance, which were caused by such injury, made him unable to resist an attack of pneumonia and rendered it fatal.⁹⁷

The French rule, on the other hand, is more strict. Where, as the result of an accident, a vigorous and active workman was confined to bed in a *milieu* favorable to infection, which confinement resulted in a state of great weakness and severe depression in the course of which he contracted tuberculosis from which he died, it was found that the accident had not directly

⁹³ *Ystradowen Co. v. Griffiths*, 2 B. W. C. C. 357 (1909).

⁹⁴ *Dunham v. Clare*, 4 M.-S. W. C. C. 102 (1902).

⁹⁵ *In re Etherington*, *supra*, note 92.

⁹⁶ *Brown v. Kent*, 6 B. W. C. C. 745 (1913).

⁹⁷ *Mass. Ind. Acc. Bd.; Merritt's Case*, 2 Mass. W. C. C. 635 (1914).

caused the disease but had produced the physical condition which made the workman susceptible to it and was the certain though indirect cause of his death; but the highest court held that that was not sufficient, and that the death or incapacity must be the "direct and immediate"⁹⁸ consequence of the accident".⁹⁹

The German rule on this point applies generally to all posterior causes of aggravation, and is as follows. The death or incapacity need not be the direct result of the accident, but may result, indirectly, from unfavorable circumstances produced by the accident. And the accident need not be the sole cause of the death or incapacity, it being sufficient that it is a weighty contributing cause.¹⁰⁰

Impending death or incapacity may be merely accelerated by a new disease. Thus where a workman, who was suffering from debility caused by a severe accident, which would have caused death within six months in any event, had his death hastened by an attack of influenza, it was held that such death was the result of the accident.¹⁰¹ This decision raises this question: If death from an accident accelerated by a disease is to be attributed altogether to the accident, why is not death from a disease accelerated by an accident to be attributed altogether to the disease? And yet, as has been seen,¹⁰² in the latter case the contrary is held.

Misconduct of the Victim.

It is a general rule that aggravations of injury imputable to the misconduct of the victim should not be considered results of the accident. But what constitutes misconduct?

Misconduct need not be positive, but may consist of the omission of a duty. The statutory obligation of the employer

⁹⁸ "Immediate" is almost synonymous with "proximate," and seems to be here used with a meaning as elastic and uncertain as that given to the latter word in English and American law

⁹⁹ *Société Nouvelle v. Veuve Grange*, *Cour de Cass.*, Feb. 21, 1912; and see also *Thomas v. Société St. Nazaire*, *id.*, Nov. 8, 1909.

¹⁰⁰ *Handbuch*, p. 249.

¹⁰¹ *Thoburn v. Bedlington Co.*, 5 B. W. C. C. 128 (1911).

¹⁰² *Supra*, pp. 419-421.

to pay compensation is subject to the implied condition that the workman shall use such reasonable care and remedial measures as are practicable and available.¹⁰³

The injured workman must submit to all reasonable surgical operations.¹⁰⁴ This does not mean that he can be compelled to submit, but simply that if he refuses to submit the consequences of such refusal should not be charged to the accident. He need not submit to a doubtful and serious operation or to one entailing danger to life.¹⁰⁵ Some decisions have gone further and laid down the rule that he need not submit to certain specific operations involving an impairment to the integrity of his body, nor to the administration of anaesthetics, because it entails danger to life.¹⁰⁶ But the better rule seems to be that he must submit to whatever a reasonable man, not claiming compensation, would elect to undergo for his own advantage and comfort.¹⁰⁷ He need submit to nothing unreasonable; and the test of reasonableness is, not whether on the balance of medical opinion the operation might reasonably be performed, but whether the man in refusing to undergo it acts reasonably.¹⁰⁸ It is reasonable for the workman to refuse an operation upon the advice of his own physician, if the latter be honest and competent, although the majority of the expert advice is to the contrary.¹⁰⁹

Some allowance, especially for temporary refusal, should be made for the ignorance, prejudices, and fears of the injured workman.¹¹⁰ Thus where the surgeons in a hospital sought the consent to operate on an ignorant foreigner, on the evening of his accident and while he was semi-unconscious, and were put off

¹⁰³ *Donnelly v. Baird*, 1 B. W. C. C. 95 (1908); cf. *Handbuch*, p. 251.

¹⁰⁴ *Handbuch*, p. 313; *Guerry v. Bourseau*, *Cour de Cass.*, Feb. 15, 1910; *Anderson v. Baird Co.*, 40 S. L. R. 263 (1903); *Donnelly v. Baird*, *supra*, note 103; *Warncken v. Moreland*, 2 B. W. C. C. 350 (1909); *Nicotero's Case*, 2 Mass. W. C. C. 351 (1914).

¹⁰⁵ *Gouttey v. Bourgenot*, *Cour d'Appel de Besancon*, Nov. 27, 1901; *McNally v. Hudson*, 95 Atl. 122 (N. J. 1915); *Handbuch*, p. 313.

¹⁰⁶ *Sachet*, pp. 253-4; *Handbuch*, pp. 252, 313.

¹⁰⁷ *Sweeney v. Pumpherston Co.*, 40 S. L. R. 721 (1903).

¹⁰⁸ *Tutton v. S. S. "Majestic"*, 2 B. W. C. C. 346 (1909).

¹⁰⁹ *Sweeney v. Pumpherston Co.*, *supra*, note 107.

¹¹⁰ *Sachet*, p. 255.

by his faint refusal, but about noon the next day finally obtained his consent, operated and he died, it was held that the delay in yielding consent was not unreasonable.¹¹¹ The decision in this case, however, might well have been based upon the ground that the evidence negated all idea that the consequences of the accident had been aggravated by the delay.

The injured workman must likewise submit to proper medical treatment and follow reasonable medical advice.¹¹² Medical treatment is here used in its broadest sense to include examinations, dressings and bandagings, special treatments (such as massage and electro-therapy), hypodermic injections of anti-toxins, lancing of sores, removal to a hospital or sanitarium, taking prescribed medicines, use of prescribed and provided apparatus (such as special boots, eye glasses, and trusses), exercising injured parts, general regulations of conduct, *etc.*¹¹³ But he will not be held responsible for the consequences of refusal to submit to the medical treatment where such refusal is not unreasonable.¹¹⁴ Thus it has been held not to be unreasonable to refuse to submit to unusually violent mechanical treatment, ordered by a consultation of the highest medical authorities, where the local physician advised against it, and neither he nor the workman were informed of the high source of the order; nor to refuse to go to a hospital proved to be unclean. On the other hand, it was held unreasonable for a woman to refuse to go to a hospital, because she did not want to neglect her children and household, when due provision was offered for their care.¹¹⁵ Nor will the workman be held responsible for failure to conform to the medical regime prescribed, where such failure is due to nervousness¹¹⁶, ignorance, or positive inability. Nor will he always be held strictly accountable, if, through habit or preju-

¹¹¹ *Jendrus v. Detroit Co.*, 144 N. W. 563 (Mich. 1913).

¹¹² *Handbuch*, pp. 251-2, 257.

¹¹³ *Handbuch*, p. 313; *Sachet*, pp. 254-6; *Steele v. Bilham*, 128 L. T. J. 416 (1910), *cit. Stone & Grove: "Workmen's Compensation and Employers' Liability Cases."*

¹¹⁴ *Moss v. Akers*, 4 B. W. C. C. 294 (1911).

¹¹⁵ *Handbuch*, p. 314.

¹¹⁶ *Smith v. Coed Co.*, 2 M.-S. W. C. C. 121 (1900).

dice, he has resorted to a family remedy or followed the advice of a quack instead of adhering to the treatment prescribed.¹¹⁷

Where, after the original treatment has terminated, a new course of treatment becomes necessary, an injured workman's duties are much the same as at first. He must even then submit to a slight and usual operation.¹¹⁸ But after his wound has healed he need not submit to new operations in the nature of experiments.¹¹⁹ He need submit to a new treatment only where there is a well founded belief that it will result in an increase in his earning capacity. A mere possibility of amelioration is not sufficient.¹²⁰

Where an injured workman unreasonably refuses to submit to treatment or an operation, the burden still rests upon the employer to break the chain of causation and show that the incapacity is due, wholly or partly, not to the accident, but to such refusal.¹²¹ But where the workman refuses all care for a *curable* injury any subsequent incapacity should be deemed the result of such refusal and not of the accident.¹²²

An injured workman must take exercise or seek light work, as may be appropriate, to regain his earning capacity, and must refrain from vicious habits tending to prevent recovery or to impair his working powers. Where his injury is healed but he is too weak to work because he has unreasonably refrained from proper exercise, his incapacity is not due to his accident.¹²³ Where he has recovered from his injury but is incapacitated because he has brooded so much over his accident that his mind will not allow him to muster courage to return to or continue at his work, or because he has become hysterical through worry-

¹¹⁷ *Handbuch*, p. 252.

¹¹⁸ *Dowds v. Bennie*, 40 S. L. R. 239 (1903); *Handbuch*, p. 311.

¹¹⁹ *Société de Marseille v. Denestebe*, *Cour de Cass.*, Dec. 16, 1912.

¹²⁰ *Handbuch*, p. 312.

¹²¹ *Marshall v. Orient Co.*, 1 K. B. 79 (Eng. 1910); *Handbuch*, pp. 257-8, 313-4. Under the German law where an injured workman wrongly refuses to submit to the medical or surgical treatment, his compensation may be wholly or partly suspended for a definite period, such suspension being subject to renewal for continued refusal, the purpose being rather to force compliance than to do exact equity in the event of non-compliance.

¹²² *Clavier v. Compagnie G. T.*, *Cour d'Appel de Rennes*, Dec. 10, 1901.

¹²³ *Upper Forest Co. v. Gray*, 3 B. W. C. C. 424 (1910); *David v. Windsor Co.*, 4 *id.* 177 (1911).

ing over the chances of his claim for compensation, his inability to work does not result from the injury.¹²⁴ If after treatment he is unable to start in again at his old occupation but is fit to start in with "light work", he must accept such work if offered or available, otherwise his continued incapacity will be due to that cause and not to his accident.¹²⁵ If after injury a workman takes to drink and subsequently is refused or discharged from employment for that reason, his inability to obtain or retain employment should not be ascribed to his injury.¹²⁶ And, generally, where drunkenness interferes with the treatment none of the consequences which would probably have been avoided had it not been for such drunkenness should be charged to the accident.¹²⁷

An injured workman should take reasonable care of himself immediately after an accident, and should enable the employer to co-operate by giving the latter prompt notice (regardless of the terms of the statute as to formal notice), both of the accident and of all subsequent developments calling for treatment. Where an unusual wetting, or exposure to an unusual draft, *etc.*, when wet or overheated, is held to constitute an accident, but the workman does not treat the event as an accident, and goes his usual way, neglecting all precautions, until some days later an acute illness develops, as in *Drylie v. Alloa Company*,¹²⁸ such illness, it is submitted, contrary to the decision in that case, should be imputed to his neglect and not to the accident. And similarly where a workman suffers a slight injury, neglects it and keeps on at his work, blood poisoning which supervenes should not be attributed to the accident.¹²⁹

¹²⁴ *Holt v. Yates*, 3 B. W. C. C. 75 (1909); *Higgs v. Unicume*, 6 *id.* 205 (1913); *Handbuch*, p. 250. On the facts such cases as these are difficult to distinguish from many cases of traumatic neurasthenia, *e. g.* *Eaves v. Blaenclydach Co.*, 2 B. W. C. C. 329 (1909); *Hunnewell's Case*, 220 Mass. 351 (1915).

¹²⁵ *Furness v. Bennett*, 3 B. W. C. C. 195 (1910).

¹²⁶ *Hill v. Ocean Co.*, 3 B. W. C. C. 29 (1909).

¹²⁷ *Handbuch*, p. 251; and cf. *McCarthy's Case*, 2 Mass. W. C. C. 57 (1914).

¹²⁸ 6 B. W. C. C. 398 (1913).

¹²⁹ *Veuve Landry v. Rochereau*, *supra*, note 72; but see, *contra*, *Fleming's Case*, *supra*, note 73; and *Handbuch*, p. 249.

Summary.

On the general subject of posterior causes of aggravation the principal controversial question is the degree of causality that must exist between the employment or the accident and the posterior cause or its consequences. The French rule practically requires that the former shall be the proximate cause of the latter, whereas the British rule requires only that the former contribute to the latter however indirectly or remotely, while the German rule, in between these two extremes, requires that the former shall at least contribute to the latter weightily. Each of these rules has its disadvantages. The German and British rules, the latter more especially, require some time limitation, otherwise a permanent injury may continue for the life of the injured person to be the subject of frequent claims for aggravations resulting from doubtfully and remotely connected causes. Such is often the case in Germany. In Great Britain that abuse is avoided by the practice of "lump sum" settlements; but under the American statutes that practice is either prohibited or discouraged.

Consequently a time limitation within which death or incapacity must result from the accident is quite general in American statutes. Moreover many of our statutes contain provisions defining or, more accurately, attempting to define the relation of causality required. Thus some of those statutes prescribe that the injuries to be compensated for shall include only injuries by violence to the physical structure of the body and such diseases or infections as naturally result therefrom.¹³⁰ Others cover only "accidental injuries and such diseases or infections as may naturally and unavoidably result therefrom".¹³¹ Others provide that "injury" shall not include a disease "except as it shall result from the injury";¹³² or "except as it shall directly result from an injury".¹³³ Yet others provide that the

¹³⁰ Louisiana, Sec. 39; Nebraska, Sec. 52b; Pennsylvania, Sec. 301.

¹³¹ Maryland, Sec. 62 (6); New York, Sec. 3 (7).

¹³² Iowa, Sec. 2477-m 16 g; Indiana, Sec. 76 d; Vermont, Sec. 58.

¹³³ Wyoming, Sec. 6 m.

injury must be proximately caused by accident.¹³⁴ And the Montana statute¹³⁵ provides that "injury refers only to an injury resulting from some fortuitous event, as distinguished from the contraction of a disease".

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¹³⁴ Wisconsin, Sec. 2394-3 (3); Colorado, Sec. 8 (III).

¹³⁵ Sec. 6 q.